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No. 91-221

In the Supreme Court of the United States

OCTOBER TERM, 1991

WALTER W. FISCHER,
PETITIONER,

v.

CITY OF DOVER, NEW HAMPSHIRE,

AND

HEIRS OF SIMON JANETOS, ELIZABETH (DROUIN) JANETOS, CHRISTINE (JANETOS) McLAIN, EVELYN JANETOS, JOHN JANETOS, COSTAS JANETOS, PETER S. JANETOS, DION JANETOS, NICHOLAS JANETOS, ANGELINE (JANETOS) BANAS, EDWARD MURPHY AND AHN MURPHY,
RESPONDENTS.

Petition for Writ of Certiorari to the Supreme Court of New Hampshire

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Questions Presented

In 1966, as a condition of approving a residential subdivision constructed that year, the planning board required the developer (the petitioner) to grant the city the right, at its discretion anytime in the future, to allow owners of undeveloped land abutting the subdivision to utilize the subdivision road and related utilities to develop their land, but subject to the city's undertaking, should it exercise this right, to pay reimbursement to the developer pursuant to a formula based on his costs for the road and utilities and the frontage of the benefitted lot(s) on the road. The city first exercised its right in 1987 for the benefit of a single residential lot, thus giving rise to the following questions:

1. Can the city, without violating the taking clause of the Fifth Amendment, made applicable to the states by the Fourteenth, reimburse the developer without making any adjustment for inflation from 1966 to 1987?

2. Can the city, without violating Art. I, § 10, cl. 1 ("No State shall . . . make any Thing but gold and silver Coin a Tender in Payment of Debts"), reimburse the developer for costs incurred and paid in 1966 dollars — defined by law and international treaty with reference to gold — by paying the formula amount in 1987 paper dollars, notwithstanding that in 1986 under 31 U.S.C. § 5112, as amended, the United States resumed issuing gold and silver legal tender coins?

3. Does the national monetary system, as it has developed since the demise in 1971 of the international gold exchange standard embodied in the Bretton Woods Agreements, 59 Stat. 512 (1945), meet constitutional requirements?

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Repondents.

Petition for Writ of Certiorari to the Supreme Court of New Hampshire

Opinions Below

The first opinion of the Supreme Court of New Hampshire (A. 5a-15a) is reported at 131 N.H. 469, 554 A.2d 1293 (1989). Its final opinion (A. 1a) is not yet reported. The opinion of the Superior Court of New Hampshire (A. 2a-4a) is not reported.

Jurisdiction

The final decision of the Supreme Court of New Hampshire was entered May 17, 1991. The jurisdiction of this court is invoked under 28 U.S.C. § 1257.

Constitutional and Statutory Provisions

U. S. Const., Art. 1, § 8, cl. 5 ("The Congress shall have power . . . To coin Money, regulate the Value thereof, and of foreign Coin"), and Art. 1, § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts"). Also U. S. Const., Fifth Amendment ("No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation"), and Fourteenth Amendment ("nor shall any State deprive any person of . . . property without due process of law"). Relevant provisions of 31 U.S.C. § 5112, as amended, relating to gold and silver legal tender coins, are reproduced in the appendix (A. 16a-18a).

Statement of the Case

This case, which has been before the Supreme Court of New Hampshire twice, arises out of a dispute between the petitioner and the City of Dover, New Hampshire, relating to the city's undertaking, made in connection with its approval of petitioner's subdivision in 1966, to reimburse the petitioner for a certain portion of the costs of constructing the subdivision road and installing utilities when and if, pursuant to permits granted by the city, these facilities were subsequently used by owners of adjacent land outside the subdivision to develop their land.

The relevant facts are largely set forth in the first opinion of the Supreme Court of New Hampshire (A. 7a-10a).

The petitioner, Walter W. Fischer, is the successor to all the rights and assets of Fischer Homes, Inc., a dissolved New Hampshire corporation of which he was the sole shareholder. In 1964, Fischer Homes applied for preliminary approval to subdivide a parcel of land in Dover into nineteen lots. The plan called for construction of a road (and related utilities) along the northern border of the subdivision, with the proposed subdivision lots all having frontage on the south side of the road. North of the road was a narrow strip of land of varying width, known as the "reserved strip," which Fischer Homes intended to retain in order to control access to the road and utilities.

The planning board granted preliminary approval on condition that Fischer Homes convey the reserved strip to the city. In return, the city agreed that when and if it allowed owners of land north of the subdivision to use the road and utilities to develop their land, reimbursement would be paid to Fischer Homes "for such share of improvements installed by Fischer Homes as shall be of benefit to said abutting property in proportion to the frontage on the Drive owned by said abutters" (A. 8a).

As a further condition of approval, Fischer Homes was required to file with the city clerk a "certified copy of all actual construction figures necessary to establish the front footage cost of highway construction to be paid by any abutters under the terms of the Contract between the City of Dover and Fischer Homes concerning the proposed reserve strip" (A. 8a).

In 1966, Fischer Homes conveyed the reserved strip and the road that it had constructed to the City. The deed to the road contained a clause reserving (A. 8a):

> . . . to Fischer Homes, Inc., its successors and assigns, the right to reimbursement from the owners

> . . . of the land abutting Country Club Estates Drive on the Northwesterly side thereof between Gulf Road and Sligo Road . . . for their proportionate share of the cost of utilities and road installation when and if they desire to use said facilities to the improvement of their abutting lands.

The deed was accepted by the city, and in 1967 Fischer Homes filed with the city clerk construction cost figures totalling $84,395.

In 1978, heirs of Simon Janetos, owners of land on the north side of the road, submitted for approval a subdivision plan creating a lot abutting the reserved strip, and conveyed this lot to Edward and Ahn Murphy. In February 1987, the city granted the Murphys a right-of-way over the reserved strip to the road, thereby allowing them to obtain a driveway permit and a certificate of occupancy. No provision was made for compensation to Fischer Homes or the petitioner, who then filed suit seeking return of the reserved strip.

On appeal from dismissal of the suit by the Superior Court for lack of standing, the Supreme Court of New Hampshire reversed and remanded the case to the Superior Court to determine the petitioner's damages (A. 15a), holding that the petitioner "has an enforceable contract claim against the City arising from the breach of its promise of reimbursement" (A. 13a). The decision continued (A. 14a):

> [T]he intention of the agreement was to provide reimbursement to the [petitioner's] corporation for the cost of the road and utilities. The City promised reimbursement to the corporation from "the owners, their heirs and assigns, of the land abutting Country Club Estates Drive." Necessarily implied in this agreement was the obligation of the City to ensure

that the corporation was in fact reimbursed, and we hold that it was the City's responsibility to do so.

The Supreme Court of New Hampshire also denied any equitable relief because the petitioner "has a plain and complete remedy at law for breach of the agreement between the City and the corporation" (A. 15a).

On remand to the Superior Court, the petitioner contended that to provide a plain and complete remedy at law, the contract must be construed to require reimbursement based on cost figures adjusted for inflation (Amended Complaint; Tr. 87-91). As the petitioner emphasized, the contract does not call for payment of a specified sum on a date certain. Nor does it contain any provision for interest.[1] It uses the dollar solely as a long term standard of value, and thus invokes the petitioner's federal constitutional right, asserted in all his state court briefs after remand, to the use and benefits of sound, stable money defined with reference to gold and having over time a reasonably constant purchasing power.

The petitioner also contended that under U. S. Const., Art. 1, § 10, cl. 1, he was entitled to recover his 1966 costs in the current legal tender gold dollars having the closest gold parity to the dollars that he expended in 1966 (Amended Complaint; Tr. 89-91).

The petitioner offered to present evidence from a real estate appraiser to show that without access to the road and utilities, the Murphys' lot in 1987 had a fair market value of $17,500, but with access its fair market value was $83,000 (Tr. 80). He contended that to let the Murphys develop their lot in 1987 at costs set in 1966 prices, and to compel the petitioner to convey to them the right to use the road and utilities at prices

[1] Accordingly, it is wholly distinguishable from ordinary state or municipal obligations on bonds, notes, or other standard contracts, and thus should not be treated as a simple contract for the payment of money. Compare *George* v. *Concord*, 45 N.H. 434, 449 (1864), with *Pike* v. *Madbury*, 12 N.H. 262, 267 (1841).

that were 20 years out-of-date, would constitute a taking of private property for public use without payment of just compensation. See *Land/Vest Properties, Inc.* v. *Town of Plainfield*, 117 N.H. 817, 822-823, 379 A.2d 200, 204 (1977), and *Robbins Auto Parts, Inc.* v. *City of Laconia*, 117 N.H. 235, 236-237, 371 A.2d 1167, 1169 (1977).

The petitioner also offered to present evidence of: (1) the replacement cost of the road and utilities in 1987 (between $250,000 and $350,000) (Tr. 79-80); (2) the historic or actual cost of the road and utilities adjusted for inflation (approximately 3.5 times their 1966 cost) (Tr. 84, 89); and (3) the 1966 cost of the road expressed in current legal tender gold dollars having the nearest gold parity to 1966 dollars (Tr. 84-85, 89-90). In this connection, the petitioner offered testimony by a monetary expert to show that the best long term measure of the dollar's true monetary value is its gold parity (*id.*).[2]

Excluding all this proposed testimony as irrelevant, the Superior Court directed a verdict pursuant to the contract formula and without adjustment for inflation or dollar debasement (A. 2a-4a). The Supreme Court of New Hampshire granted

[2] For a detailed analysis of gold as the most reliable and consistent long term measure of value, see R. W. Jastram, *The Golden Constant* (Wiley, 1977).

Notwithstanding the demise of the international monetary system established by the Bretton Woods Agreements, gold remains the world's money of last resort. It continues to be held by all major nations as a principal component of their monetary reserves. Its continued monetary role is also evidenced by other facts. The Bank for International Settlements, often referred to as the "central bank for central banks," continues to keep its accounts in Swiss gold francs. See Bank for International Settlements, *61st Annual Report*, June 10, 1991. Many major banks and bullion dealers, including some central banks, make gold loans to qualified customers at interest rates well below those available for loans in any national currency since no inflation component attaches to loans made and repayable in gold. See "Gold Lending Rate at Record Level," *Financial Times* (London), Dec. 4, 1990, p. 38 (interdealer gold-loan rate ("gold libor") at 3.25% per annum). While the gold price is volatile, especially in the short term, similar volatility affects foreign exchange rates. In short, for large, financially sophisticated international borrowers and lenders, gold loans are simply an alternative to foreign currency loans.

further discretionary review of all the constitutional questions raised by the petitioner on remand in the Superior Court, but after briefing and argument affirmed the judgment of that court without a formal opinion (A. 1a).

Reasons for Granting Certiorari

I. The Importance of the Questions Presented Is Self-Evident, and the Most Opportune Time to Decide Them Is Now.

While the "contract" at issue was imposed by the state as a condition of subdivision approval, the underlying problem is that the national monetary system in effect since 1971, when President Nixon closed the gold window and unilaterally terminated the international gold exchange standard established by the Bretton Woods Agreements (see *infra*, pp. 22-23), has failed to maintain the dollar as a standard of value.

This case presents the Court with a timely opportunity — on quite unique facts — to review and reconsider the monetary provisions of the Constitution in light of monetary developments since 1971. Domestically, these include two decades of serious secular inflation (see *infra*, p. 11), elimination of restrictions on private ownership of gold in 1974, repeal of the prohibition on gold clauses in 1977 (see *infra*, p. 13 n.10), and reissuing of legal tender gold and silver coins in 1986. See *infra*, pp. 11-13. At the international level, they include increasing dissatisfaction with floating exchange rates,[3] move-

[3]See, *e.g.*, L. E. Lehrman, "The Curse of the Paper Dollar," *The Wall Street Journal*, Nov. 6, 1990, p. A22; R. L. Bartley (editor), "The Great International Growth Slowdown," *The Wall Street Journal*, July 10, 1990, p. A16; R. M. Bleiberg (editorial page editor), "Floating Rates Sink — The World Economy Needs a Fixed Standard of Value," *Barron's*, Oct. 2, 1989, p. 11.

ment toward a common European currency[4], and serious suggestions that the Soviet Union adopt a convertible gold ruble.[5]

The petitioner does not ask the Court to reverse any of its prior decisions under the monetary provisions of the Constitution. Rather, he asks the Court to reaffirm and enforce the irreducible principles of honest government and sound money left standing by those decisions. See *infra*, pp. 18-21.

Whatever the monetary system, wars are often financed by inflation, even by countries otherwise wedded to principles of sound money. The Cold War, with its enormous requirements for defense expenditures, unfortunately was no exception. Courts, even this Court, are not unaffected by the perceived practical demands of war. *E.g.*, *Korematsu* v. *United States*, 323 U.S. 214 (1944). But in our country at least, the end of war has ordinarily brought a renewal — even at times a renaissance — of fundamental values. *Brown* v. *Board of Education*, 347 U.S. 483 (1954), not *Korematsu*, is our constitutional beacon for distinctions based on race or national origin.

If it ever could, the Cold War can no longer excuse judicial reluctance to apply the monetary principles of the Constitution. Unmasking dogmas about the efficacy of command economies for the drivel they were, the end of the Cold War has unleashed free market forces that have quickened the pace of political and economic change around the globe. One likely result in the not too distant future is the emergence of a changed international monetary system. Particularly as Europe moves toward a common currency, the United States cannot view the international position of the dollar with complacency.

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[4] See, *e.g.*, E. Balladur, "A Stronger Dollar, a New Money Order," *The Wall Street Journal*, Dec. 5, 1990, p. A16. Mr. Balladur is a former finance minister of France.

[5] See, *e.g.*, J. Wanniski, "Gold-Based Ruble? Two U.S. Economists Urge Hard Money on the Soviet Union," *Barron's*, Sept. 25, 1989, p. 9. The other economist was Federal Reserve Board Governor Wayne Angell.

Accordingly, if this Court is ever going to resurrect the monetary principles of the Constitution, the time to do so is now, ahead of the monetary changes that are sure to come. The Court should grant certiorari in this case to reaffirm that the morals of the coin-clipper and the note-shaver are not those of the Constitution, and can provide no basis for the legal money of the United States.

For the nation's greatest constitutional statesmen, sound money based on gold or silver was no pipedream. It was a constitutional and moral necessity. With more than their usual eloquence, John Adams, Jefferson, Madison, Marshall, Story, Webster and Holmes all recognized unlimited paper money for the constitutional abomination that the facts of this case show it to be: official theft. See *infra*, pp. 17, 25-26 & n.17. See also X *Works of John Adams*, p. 376 (Adams-Jefferson correspondence on the subject); 2 J. Story, *Commentaries on the Constitution of the United States* (5th ed., 1891), § 1360, p. 230. So, too, did the classical economists. See J. S. Mill, *Principles of Political Economy*, (orig. ed., 1848) (5th ed., 1877), Bk. III, Ch. XIII, § 3; A. Smith, *The Wealth of Nations* (orig. ed., 1776) (Random House, 1937), p. 311.

Before assuming his present position as Chairman of the Federal Reserve Board, Alan Greenspan wrote: "In the absence of the gold standard, there is no way to protect savings from confiscation through inflation." A. Greenspan, "Gold and Economic Freedom," in A. Rand, *Capitalism: The Unknown Ideal* (New American Library, 1966), p. 94. Today he is still committed to the goal of zero inflation, but he is trying to achieve it through high interest rates rather than by credibly pegging the dollar to gold. See, *e.g.*, "Greenspan's Retention Emboldens Fed Hawks To Keep Money Tight," *The Wall Street Journal*, July 11, 1991, pp. A1, A4. History records many examples of nations that restored gold convertibility to their currencies and thereby not only stopped inflation but also

triggered a period of rapid economic growth. See A. Reynolds, "Gold and Economic Boom, Five Case Studies, 1792-1926," in B. Siegel ed., *Money in Crisis* (Ballinger, 1984).[6] It records none of countries achieving the same beneficial results by trying to restore credibility to unlimited paper money through high interest rates.[7]

In urging the Soviet Union to establish gold convertibility for the ruble, Fed Governor Angell emphasized the effect that it would have on the government's borrowing costs, suggesting: "As markets gain experience with Soviet gold-backed bonds, interest on the bonds could be expected to decline, perhaps approaching 2%, the going rate for U. S. gold-mining company gold bonds." W. Angell (interview), "Put the Soviet Economy on Golden Rails," *The Wall Street Journal*, Oct. 5, 1989, p. A28. That the same approach could be used to reduce or eliminate the U. S. budget deficit has not been missed. See, *e.g.*, C. Kadlec, "Gold's the Way to Cut Interest Costs," *The Wall Street Journal*, May 21, 1990, p. A12.[8] Asked about this possibility at a dinner in New York sponsored by the Committee for Monetary Research & Education in July 1990, Mr. Angell responded that because the United States went off the gold standard "by statute," the credibility of a U. S. promise to repay in gold could be difficult to reestablish. This case gives the Court an opportunity to reassert a constitutional basis for such a promise. See *infra*, pp. 19-21.

[6] Two of these case studies involve the United States: "The Hamilton Dollar of 1792" covers the period immediately following the adoption of the Constitution; and "Ending the Greenback Era" covers the return to the gold standard after the Civil War.

[7] What is more, the above-cited article in *The Wall Street Journal* reports that Mr. Greenspan's principal supporters on the Federal Open Market Committee are the so-called "Reserve Bank" members. If true, they are exercising enormous official power over the national economy notwithstanding that they have never been confirmed by the Senate under the appointments clause. See *infra*, p. 24 & n.16.

[8] The article opens with this question: "Why aren't interest rates on U.S. government bonds below 5%, just as they were for 88 out of the 90 years before 1967?

II. To Reimburse the Petitioner in 1987 for Costs Incurred and Paid in 1966 With No Adjustment for the Intervening Inflation Violates Not Only the Fifth and Fourteenth Amendments, But Also the Constitutional Provision That Forbids States to Compel Citizens to Accept Depreciated Paper Money in Payment of Debts Incurred in Real Money.

A. *Inflation and the Debasement of the Dollar.*

The decade of the 1970's was one of particularly severe inflation. Although inflation was brought under better control in the 1980's, it still remained high by historical standards. The Consumer Price Index (CPI/U) calculated by the U. S. Department of Labor rose from a base of 100 in 1967 to 354 by 1987. Thus, according to the federal government's own statistics, the dollar by 1987 had the purchasing power of less than 30 cents in 1966.[9]

The petitioner incurred total costs of $84,395 for road construction and utilities in 1966, and paid them in 1966 dollars. A remedy that purports to reimburse this amount in an equal number of 1987 paper dollars is wholly illusory and does gross injustice to the petitioner.

B. *Current Legal Tender Gold Dollars.*

In 1985 Congress authorized the United States to resume issuing legal tender gold and silver coins in the fall of 1986. 31 U.S.C. § 5112, as amended by Pub. L. 99-185, 99 Stat.

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[9] This long term, persistent, structural inflation is often called "secular" inflation to distinguish it from transitory price increases due to shortages, wars or other events external to the monetary system. In recent years many courts have allowed damages at law to be adjusted for secular inflation. See, *e.g.*, *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 547-549 (1983); *Culver* v. *Slate Boat Co.*, 722 F.2d 114 (CA5 1983); *Hunter* v. *Reardon Smith Lines*, 719 F.2d 1108, 1113-1114 (CA11 1983), *cert. denied*, 467 U.S. 1205 (1984); *Gretchen* v. *United States*, 618 F.2d 177, 181 (CA2 1980).

1177 (Gold Bullion Coin Act of 1985), and Pub. L. 99-61, Title II, § 202, 99 Stat. 115 (Liberty Coin Act) (A. 16a-18a). Under these acts the federal government now issues legal tender gold and silver coins in the following weights and denominations:

Coin and Weight	Face Value (Legal Tender Value)
one ounce gold coin	$50.00
one-half ounce gold coin	25.00
one-tenth ounce gold coin	5.00
one-quarter ounce gold coin	$10.00
one ounce silver coin	$1.00.

These coins are sold to the public at a price equal to the market value of the bullion at the time of sale plus costs of minting and distribution. 31 U.S.C. § 5112(f) and (i)(2)(A). They are legal tender at their respective face values along with all other U. S. coins and currency, including Federal Reserve notes. 31 U.S.C. §§ 5103, 5112(h). However, the coins cannot be obtained at the Treasury in a dollar-for-dollar exchange for Federal Reserve notes or any other coin or currency. 31 U.S.C. § 5118(b), as amended by Pub. L. 99-185, § 2(d), 99 Stat. 1178. Accordingly, in addition to the paper dollars issued by the Federal Reserve, the legislation authorizing these gold and silver coins creates three new dollars having different intrinsic values: one-fiftieth ounce gold; one-fortieth ounce gold (the $10 gold coin); and one ounce silver.

The current legal tender dollars having the nearest gold parity to the 1966 dollars which the petitioner expended are the legal tender gold coins of the United States containing one-

quarter ounce of fine gold and having a face or legal tender value of $10. At their legal tender face value, payment of the judgment amount of $7757.97 would require 775.8 of these coins, or 193.95 ounces of fine gold, having a current market value (at approximately $360/ounce) of $69,800 in current Federal Reserve notes.[10]

C. *The Monetary Disabilities of the States.*

Whatever the parameters of a citizen's right to the use and benefits of sound money in ordinary transactions (see *infra*, pp. 17-23), it has special and specific protection in transactions between a citizen and a state. Article 1, § 10, cl. 1, of the Constitution provides in relevant part: "No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts."

[10] In the present case, the obligation to pay in gold (or silver) arises from Art. 1, § 10, cl. 1 (see *infra*, pp. 13-16), not from a gold clause, and therefore 31 U.S.C. § 5118(d)(2) does not apply. It provides:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

Even if this section did apply, the obligation at issue was not established until the city conveyed the right-of-way to the Murphys in 1987. *Cf. Fay Corp.* v. *Bat Holdings I, Inc.*, 646 F.Supp. 946, 949 & n.6 (W.D. Wash. 1986), *recon. denied*, 651 F.Supp. 307 (1987), 682 F.Supp. 1116 (1988), *aff'd*, 896 F.2d 1227 (CA9 1990). And even if the obligation is deemed to run from 1966, it is not rendered invalid by the first sentence of the section. In its present form, the section dates from 1982 (Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 985), three years before the federal government resumed issuing legal tender gold and silver coins. The first sentence simply does not address the question of choosing between different legal tenders except to require that they be treated dollar for dollar at their face values. There is nothing in this sentence that prohibits the petitioner from demanding and receiving, for a debt stated and incurred in 1966 dollars, payment of an equal number of dollars as measured by the legal tender face value of current United States gold coins. Compare 31 U.S.C. § 5118(b) and (c) relating to any similar demand against the United States Government.

The purpose of this clause was to prevent the states from paying their own debts, or from allowing private citizens to pay their debts, in depreciated paper currencies. Both evils were common occurrences prior to the adoption of the Constitution. See *Edwards* v. *Kearzey*, 96 U.S. 595, 604-606 (1878), and history texts cited. They stand condemned in one of the most moving paragraphs of *The Federalist Papers* (No. 44 (Madison) (Modern Library ed. at 290-291)):

> The extension of the prohibition to bills of credit must give pleasure to every citizen, in proportion to his love of justice and his knowledge of the true springs of public prosperity. The loss which America has sustained since the peace, from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people, and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice, of the power which has been the instrument of it. . . . *The power to make any thing but gold and silver a tender in payment of debts, is withdrawn from the States, on the same principle with that of issuing a paper currency.* [Emphasis supplied.]

Unlike the prohibitions on the states contained in Art. I, § 10, cl. 2 and cl. 3, which begin with the words "No State shall, without consent of Congress," the prohibitions contained in the first clause are absolute. *Edwards* v. *Kearzey*, *supra*, 96 U.S. at 604, 607. *Gunn* v. *Barry*, 82 U.S. (15 Wall.) 610,

623 (1872). Indeed, the framers of the Constitution expressly considered and rejected proposals to allow exceptions to the monetary prohibitions with the approval of Congress. 2 M. Farrand ed., *The Records of the Federal Convention of 1787* (Yale Univ. Press, 1966), pp. 144, 169, 187, 439 & n.14. Congress, therefore, has no power to authorize or permit — directly or indirectly — any state to violate the prohibitions contained in Art. I, § 10, cl. 1, especially the monetary prohibitions.

A fortiori, the federal government cannot, by exceeding its own monetary powers under the Constitution, authorize the states to resume the practices that Art. I, § 10, cl. 1, was intended to prohibit. Two wrongs do not yet make a right.

Whatever may have been the situation at certain times in the past, there is nothing in federal law today to excuse strict enforcement of Art. I, § 10, cl. 1. Unlike Civil War greenbacks or Federal Reserve notes prior to 1971, there is no sense in which current paper dollars can be said to be a temporary or functional equivalent to gold coin. Ownership of gold is again lawful, and Congress has provided for legal tender gold and silver coins. Since one of them is but little debased from the money expended by the plaintiff in 1966, the Constitution, common sense and simple fairness all direct that it be the medium of reimbursement.

Accordingly, Art. I, § 10, cl. 1, should now be enforced to bar a state, or any instrumentality thereof, from compelling an unwilling private creditor to accept anything other than gold or silver coin in payment of its obligations. This does not mean that a state cannot enter into voluntary contracts that provide — expressly or by implication — for payment or repayment in Federal Reserve notes. For example, persons who purchase state or municipal bonds, paying for them in paper money and accepting an interest rate based on the use of paper money, cannot later legitimately claim that they are entitled to be repaid

in gold or silver coin. In that situation, the contract is voluntary and the use of unlimited paper money a mutually shared assumption. The constitutional prohibition aims at the unfair and coercive imposition of depreciated paper. That is the situation in the case at bar.

III. Only This Court Can Appropriately Decide the Constitutional Monetary Issues Raised By This Case, and It Has a Duty to do so That Can No Longer Be Properly Avoided.

After remand, in all his briefs and arguments in the state courts, and in his petition for leave to appeal the decision of the Superior Court on remand to the New Hampshire Supreme Court, the petitioner asserted a fundamental constitutional right in all transactions to the use and benefits of sound, stable money defined with reference to a weight of gold (or silver) and having over time a reasonably constant purchasing power. He further asserted that he was entitled to rely on this right when he entered into his agreement with the city in 1966, and that he is entitled to have it vindicated now. Indeed, he would have no quarrel with the judgment entered in the state courts if the U. S. dollar since 1966 had maintained its value in the same way that it did from the adoption of the Constitution through the early decades of the twentieth century.[11]

[11] The "dollar" referred to in the Constitution (Art. I, § 9, cl. 1, and Seventh Amendment) is the Spanish milled dollar, which under the Coinage Act of 1792, 1 Stat. 246, became the standard dollar weighing 371.25 grains of silver ($1.29/ounce).

Between 1792 and 1972, the gold weight of the dollar was changed only twice. In 1834 the gold dollar was reduced from 24.75 grains of pure gold ($19.39/ounce) to 23.22 grains ($20.67/ounce) to equalize the mint ratio with the market ratio of silver to gold, the latter by operation of Gresham's law having fallen out of circulation. At that time, both metals were standard money, but the silver dollar remained the standard dollar and standard of value. See F. B. Garver and A. H. Hansen, *Principles of Economics* (Ginn, 1929), pp. 322-324.

In 1934, with the nation on the gold standard and the gold dollar as the standard of value, the dollar was devalued to $35 per ounce of fine gold. Due to the general deflation and correspondingly low market price of silver, the weight of the silver dollar was left unchanged at 371.25 grains, the level set by the first coinage act, where it remained until 1968. See *infra*, p. 21, n.13.

A. *The Constitutional Right to Sound Money.*

The Constitution vests Congress with exclusive power to coin money and regulate its value. Art. I, § 8, cl. 5; Art I, § 10, cl. 1. "The great end and object of this restriction on the power of the states . . . was . . . to give to the United States the exclusive control over the coining and valuing of the metallic medium. That the real dollar may represent property, and not the shadow of it." *Craig* v. *Missouri*, 29 U.S. (4 Pet.) 410, 442-443 (1830) (opinion of the Court by Marshall, C. J.). See *The Federalist Papers*, No. 42 (Madison) (Modern Library ed. at 275-276), and No. 44 (Madison) (Modern Library ed. at 290) (quoted *supra*, p. 14). See also 2 J. Story, *Commentaries on the Constitution of the United States*, *supra*, esp. §§ 1118, 1119, 1372.

The government's monetary powers rest on a different basis than its powers over commerce. *United States* v. *Marigold*, 50 U.S. (9 How.) 261, 262-263 (1849). As there described by the Court (*id.* at 263):

> They appertain rather to the execution of an important trust invested by the constitution, and to the obligation to fulfil that trust on the part of the government, namely, the trust and duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to congress by the constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value . . . .

The right to the use and benefits of sound and stable money is essential to "liberty and the pursuit of happiness" in a free society. It is just as much entitled to constitutional protection

as other fundamental rights and values which have considerably less specific textual basis in the Constitution or its amendments. See, *e.g.*, *Bates* v. *City of Little Rock*, 361 U.S. 516, 522-523 (1960) (freedom of association); *Shapiro* v. *Thompson*, 394 U.S. 618, 629-631 (1969) (right to interstate travel); *Griswold* v. *Connecticut*, 381 U.S. 479, 484-486 (1965) (right to privacy).

B. *The Two Basic Constitutional Requirements for Sound Money.*

In the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 553 (1870), the Court held that the federal government had the power to make bills of credit legal tender for private debts, but expressly rejected the notion that Congress could make paper money a standard of value or that the notes at issue (the Civil War "greenbacks") were anything other than promises to pay gold dollars at some future though unspecified date:

> It is said that there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the subject before us. The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, the Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples there-

> of. . . . It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.

These same points were emphasized in the concurring opinion of Justice Bradley (*id.* at 560):

> This power [to emit legal tender notes] is entirely distinct from that of coining money and regulating the value thereof. It is not only embraced in the power to make all necessary auxilliary laws, but it is incidental to the power of borrowing money. It is often a necessary means of anticipating and realizing promptly the natural resources, when, perhaps, promptness is necessary to the national existence. It is not an attempt to coin money out of a valueless material, like the coinage of leather or ivory or kowrie shells. It is a pledge of the national credit. It is a promise by the government to pay dollars; it is not an attempt to make dollars. The standard of value is not changed.

In the *Gold Clause Cases*, 294 U.S. 240 (1935), while upholding the various monetary measures of the New Deal, including the devaluation of the dollar from $20.67 to $35 per ounce of fine gold, the Court noted that the dollar retained its value both in silver and in purchasing power, and expressly held that the federal government could not use its monetary powers to depreciate the purchasing power of its own obligations, including Federal Reserve notes. *Perry* v. *United States*, 294 U.S. 300, 350-351, 353-354 (1935).

In *Perry*, which dealt with gold clauses in government bonds, the Court stated the fundamental issue (*id.* at 350):

> There is no question as to the power of the Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States. . . . [T]he Government [contends] that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

The Court held (*id.* at 350-351)[12]:

> We do not so read the Constitution. There is a clear distinction between the power of the Congress

[12] Although Justice Stone did not join in this portion of the opinion (*id.* at 361), the four dissenting Justices stated (*id.* at 377):

> Congress may coin money; also it may borrow money. Neither power may be exercised so as to destroy the other; the two clauses must be so construed as to give effect to each. Valid contracts to repay money borrowed cannot be destroyed by exercising power under the coinage provision.

to interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money "*on the credit of the United States*," the Congress is authorized to pledge that credit as an assurance of payment as stipulated, — as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. [Emphasis in original.]

While holding that Congress was without authority to nullify or override the gold clauses in government bonds, the Court in *Perry* also held: "Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever." *Id.* at 357. "On the contrary," said the Court, "payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment." *Id.* at 358.[13]

[13] The intent of the 1934 devaluation was to raise prices during a period of severe price deflation. See J. P. Warburg, *The Money Muddle* (Knopf, 1934), esp. pp. 147, 211. The economic theoreticians of this measure were professors George F. Warren of Cornell and James Harvey Rogers of Yale, who urged a "commodity dollar" under which the gold parity of the dollar would be allowed to fluctuate to maintain a constant purchasing and debt-paying power. *Id.* at 134-140. President Roosevelt himself described his goal more modestly as "'a medium of exchange

C. Changes in the Monetary System since 1971 Have Frustrated the Petitioner's Lawful and Legitimate Expectations.

As the petitioner put it at trial (Tr. 81), in 1966 "the dollar was going along normal." Its gold parity was set by federal law at $35 per ounce of fine gold (31 U.S.C. § 314), and the Secretary of the Treasury was required to maintain the dollar's value at this standard. In addition, under the Bretton Woods Agreements, 59 Stat. 512 (1945), the United States was required by international treaty to redeem in gold at the legal standard of $35 per ounce dollars presented by foreign states. See Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, 2 U.N.T.S. 39, T.I.A.S. No. 1501 (1945).

Thus, when the petitioner entered into his contract with the city in 1966 calling under certain circumstances for future partial reimbursement of the costs of the road and utilities, he was entitled to assume that any future payments would be made in money meeting constitutional requirements, *i.e.*, defined with reference to gold and having approximately the same purchasing power as the money that he expended in 1966.

In 1971, in violation of domestic law and the nation's treaty obligations, President Nixon closed the gold window and the United States ceased making payments in gold for dollars presented by foreign states. As a result of this action, the dollar for the first time since the adoption of the Constitution was

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which will have over the years less variable purchasing and debt-paying power for our people than that of the past.'" *Id.* at 161. See *id.* at 179-182.

Professor Warren's participation is ironic. In 1876, in connection with the Congressional debate over the resumption of specie payments, Andrew Dexter White, founder and first president of Cornell, wrote and read to members of the House and Senate his classic essay on the French assignats of the 1790's. A. D. White, *Fiat Money Inflation in France* (orig. ed., 1876) (Foundation for Economic Education, 1959).

no longer effectively linked, directly or indirectly, to gold.[14] See *Trans World Airlines* v. *Franklin Mint Corp.*, 466 U.S. 243, 248-249 (1984).

The facts of this case display in graphic manner the utter failure of the monetary system in effect since 1971 to maintain and preserve the value of the dollar, either in gold or purchasing power. This failure is directly attributable to the fact that this monetary system violates the two irreducible monetary principles of the Constitution as set forth in the *Legal Tender Cases* and the *Gold Clause Cases*: (1) the dollar must be credibly defined with respect to weight of gold (or silver) and cannot be an indeterminate paper standard of value; and (2) the federal government cannot use its monetary powers to depreciate the purchasing power of its own obligations, including Federal Reserve notes.

D. *A Potato Too Hot for Any but this Court to Handle.*

Unlike the great changes in the national monetary system brought on by the Civil War and the Great Depression, the equally important changes effected by the closing of the gold

[14] In 1972, Congress authorized and directed the Secretary of the Treasury to establish a new par value for the dollar of $38 per ounce of fine gold (Pub. L. 92-268, § 2, 86 Stat. 116 (1972)), which it amended in 1973 to $42.22 per ounce or .828948 IMF Special Drawing Right. Pub. L. 93-110, § 1, 87 Stat. 352 (1973). Effective April 1, 1978, Congress repealed the 1973 par value act, leaving the dollar for the first time since 1792 statutorily undefined with reference to gold or silver. Pub. L. 94-564, § 6, 90 Stat. 2661 (1976), repealing 31 U.S.C. § 449. See 31 U.S.C. §§ 314, 831, repealed by Pub. L. 97-258, § 5, 96 Stat. 877 (1982).

The demise of the dollar's international convertibility into gold had its domestic counterpart in the gradual elimination of the gold cover requirements for Federal Reserve notes and the deposit liabilities of Federal Reserve banks. 12 U.S.C. § 413, as amended by 59 Stat. 237 (1946) (reducing gold cover from 35 to 25 percent against deposits and from 40 to 25 percent against notes in circulation), Pub. L. 89-3, § 1, 79 Stat. 5 (1965) (eliminating gold cover for deposits), and Pub. L. 90-269, § 3, 82 Stat. 50 (1968) (eliminating gold cover for notes in circulation). Under the Silver Certificate Act of 1967, Pub. L. 90-29, 81 Stat. 77, the dollar also lost is convertibility into silver.

window in 1971 have not been addressed by this Court.[15] The federal courts are now so skittish about any issue affecting the monetary system that they will not even consider constitutional challenges to the manner of appointing the five so-called "Reserve Bank" members of the twelve-member Federal Open Market Committee ("FOMC").[16] The notion that federal courts have "equitable discretion" to refuse in an otherwise proper case to apply and enforce the Constitution is contrary to the basic premise that supports the doctrine of judicial review: "that a law repugnant to the constitution is void; and that the courts, as well as other departments, are bound by that instrument." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

[15] At the same time, the lower federal courts have shown extreme reluctance to consider on the merits any challenge to the constitutionality of the national monetary system. See, *e.g.*, *Howe* v. *United States*, 632 F. Supp. 700 (D. Mass. 1986), *aff'd per curiam*, 802 F.2d 440 (CA1 1986), *cert. denied*, 479 U.S. 1066 (1987); *United States* v. *Moon*, 616 F.2d 1043 (CA8 1980); *United States* v. *Ware*, 608 F.2d 400 (CA10 1979); *United States* v. *Anderson*, 584 F.2d 369 (CA10 1978); *Mathes* v. *Commissioner of Internal Revenue*, 576 F.2d 70 (CA5 1978); *Milam* v. *United States*, 524 F.2d 629 (CA9 1974).

[16] In a recent series of four cases, various plaintiffs, including a congressman, two senators, and several private groups, claimed that the appointments of the five Reserve Bank members violate the appointments clause (U.S. Const., Art. II, § 2, cl. 2) because they are made without the advice and consent of the Senate. Pointing to the enormous power wielded by the FOMC under the existing monetary system, including its control over all open market operations of the Federal Reserve banks (12 U.S.C. § 263(b)), the plaintiffs in each case contended that all its members must be deemed "officers of the United States" within the meaning of the appointments clause.

In contradictory procedural rulings, the Court of Appeals for the District of Columbia avoided the constitutional issue in each case. *Reuss* v. *Balles*, 584 F.2d 461 (CADC 1978), *cert. denied*, 439 U.S. 997 (congressman did not have standing as either a congressman or a private bondholder to challenge the constitutionality of the composition of the FOMC). *Riegle* v. *Federal Open Market Committee*, 656 F.2d 873, 878-879, 881-882 (CADC 1981), *cert. denied*, 454 U.S. 1081 (senator did have standing because of his right under the appointments clause to vote on nominations of important policy-making officials, but case dismissed in court's "equitable discretion" to refrain from deciding cases brought by legislators if the legislator could obtain substantial relief from his fellow legislators and private parties would have standing to raise the same claim). *Committee for Monetary Reform* v. *Board of Governors of the Federal Reserve System*, 766 F.2d 538, 542 (CADC 1985) (group of private businesses and individuals did not have standing

The reluctance of lower federal courts and state courts to decide issues pertaining to the constitutionality of the monetary system is understandable, perhaps even commendable in certain respects. But it is defensible only if this Court fulfills its duty to decide these enormously important questions. Otherwise, the duty of the courts to decide properly presented constitutional questions is being shirked. The petitioner's constitutional claims in this case were not even acknowledged by the Supreme Court of New Hampshire, presumably because it felt that any pronouncements about the constitutionality of the national monetary system should come from this Court. But if the Court denies this petition, the petitioner's constitutional claims will never be addressed by any court, and the Supreme Court of New Hampshire, by deferring to this Court, will have participated instead in a dereliction of judicial duty.

IV. The Constitutional Issues Raised by this Case go to the Very Structure of the Government Established by the Constitution, and Involve the Basic Integrity of the Government and the Independence of the Judicial Branch.

Daniel Webster forecast that to divorce "the constitutional standard of value" from gold (or silver) "would shake the whole structure." "Speech on the Specie Circular", IV *Webster's Works* (9th ed., Little, Brown, 1856), pp. 270-271,

because, assuming that allegations of "serious financial damage as a result of monetary instability and high interest rates in recent years" satisfied the requirement of injury in fact, the causation and redressability requirements were not met since, notwithstanding the suggestion in *Riegle* that private parties might have standing, the causal link between high interest rates and the participation of the five Reserve Bank members in FMOC decisions was too attenuated). *Melcher* v. *Federal Open Market Committee*, 836 F.2d 561, 564-565 (CADC 1987), *cert. denied*, 486 U.S. 1042 (1988) (doctrine of equitable discretion applied to dismiss senator's case reraising *Riegle* issue notwithstanding the inability of private parties to raise the same claim).

quoted in part by Justice Field in his dissent in *Juilliard* v. *Greenman*, 110 U.S. 421, 454-455 (1884).[17]

Severing the link between the dollar and gold in 1971 has had just the effect that Webster predicted. Formerly, with metallic money or legal tender notes directly or indirectly redeemable in gold or silver, the government was under substantial pressure to conduct its fiscal and monetary affairs in a manner consistent with its underlying obligation to repay its borrowings in money of the existing standard of value. Today, with an unlimited, inconvertible paper currency, the government is not held to any external monetary standard. Its credit now rests not on its financial prudence or even its power to tax, but on its power to print or otherwise create unlimited amounts of paper dollars having no defined or intrinsic value. Its borrowing power — at least in its own currency — is thus virtually unlimited, and so therefore is its ability to run budget deficits. It is no accident that as long as the nation's money was linked to gold, there were no suggestions for a "balanced budget" amendment. See P. Fabra, "Gold Convertibility Is the Key," *The Wall Street Journal*, July 24, 1985, p. 20. *Cf. Bowsher* v. *Synar*, 478 U.S. 714 (1986).

The obliteration of the dollar as a reliable, permanent standard of value also defeats the purpose of the compensation clause in Art. III, § 1, which provides that federal judges shall "receive for their services, a Compensation, which shall not be diminished during their continuance in office." The degree of judicial dependence on the political branches is greatly increased under a mone-

[17] Webster, of course, did not believe that the federal government had authority to make paper money a legal tender. Oliver Wendell Holmes took the same view in a series of favorable comments on Justice Field's similar dissent in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 649-651 (1870). 4 Am. Law Rev. 768 (1870); 7 Am. Law Rev. 147 (1872); 1 *Kent's Commentaries* (12th ed.) 254 (1873). In light of these comments, it seems certain that Justice Holmes had the *Legal Tender Cases* specifically in mind when he penned the famous opening line to his first great dissent: "Great cases like hard cases make bad law." *Northern Securities Co.* v. *United States*, 193 U.S. 197, 400 (1904).

tary system that systematically depreciates the purchasing power of the dollar. See *Atkins* v. *United States*, 536 F.2d 1028, 1045-1047 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978). *Cf. Evans* v. *Gore*, 253 U.S. 245, 254 (1920).

Madison's proposal to lessen even further the dependence of the judiciary by a prohibition on increases in judicial salaries was rejected by the Federal Convention, not so much because of possible fluctuations in the value of the metals as because salary increases might be warranted by increases in the general standard of living or the work of the judges. See 2 M. Farrand ed., *The Records of the Federal Convention of 1787*, *supra*, pp. 45, 429-430. There is no evidence that the framers ever contemplated that the judiciary (or anyone else) would have a continuing need over many years for "cost-of-living" increases. However, secular inflation — particularly as exacerbated since 1971 — has made federal judges almost annual supplicants for Congressional largesse along with all other government employees and beneficiaries, certainly a far cry from the minimal dependence on the political branches contemplated by the framers.

In 1966 federal circuit judges received an annual salary of $33,000; by 1988 their salary had risen to $95,000, not quite keeping pace with inflation. 28 U.S.C. § 44, as amended. But by 1991, their salary had increased to $132,700, more than outstripping inflation since 1966. *Id.* The salaries of other federal judges show a similar pattern. 28 U.S.C. §§ 5, 135, 172, 252, as amended. As a result, pressure for further constitutional confrontation over the effect of inflation on judicial salaries has eased. Congress must have sensed, particularly after *Atkins*, *supra*, that one sure way to force judicial consideration of the constitutionality of the post-Bretton Woods monetary system was to expose federal judges to a heavy dose of the inflationary consequences. No one questions that federal judges were entitled to relief from inflation. But that relief

carries with it a special obligation to make sure that ordinary citizens do not see it as a bribe, paid by the political branches for judicial silence on the constitutional questions arising from an inherently inflationary monetary system.

The petitioner's complaint arises on quite unique facts. But its essence could be asserted by every American taxpayer who pays income tax on long term capital gains. See, *e.g.*, M. Feldstein, "A National Savings President," *The Wall Street Journal*, Nov. 21, 1988, p. A16. Perfect indexation of capital gains for inflation may not be required, but basic notions of equal protection are as applicable to income taxes as property taxes. See *Allegheny Pittsburgh Coal Co.* v. *Webster County*, 109 S.Ct. 633 (1989). A thousand dollars earned in 1991 is a very different thing in real terms from a thousand dollars earned on an asset bought for that amount in 1966 and sold for two thousand in 1987 or 1991. To tax both amounts as if they represent equal amounts of real income cannot comport with any fair notion of equal protection of law.

It is not this Court's job to design a monetary system for the country. But it is this Court's job to say whether the current monetary system, as fashioned by Congress and the President, meets existing constitutional requirements. If it does not, but the American people are satisfied with it and want to let it continue, they may amend the Constitution to authorize it. But as a matter of judicial interpretation, to read out of the Constitution provisions that are in it is just as objectionable as to read into it provisions that are not. If words have meaning, no authority now exists in the Constitution for unlimited paper money. If the nation's great experiment with unlimited paper is to continue, it should do so on the authority of a constitutional amendment adopted by the American people, not on a failure of nerve and duty by this Court. For if it proceeds on the latter basis and turns out badly, the damage to the reputation and standing of this Court will be deserved, self-inflicted and incalculable.

Conclusion

This case — coming from New Hampshire, invoking Art. I, § 10, cl. 1, of the Constitution, and having substantial potential impact on the future economic life of the nation — brings to mind *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819). See IV A. J. Beveridge, *The Life of John Marshall* (Houghton Mifflin, 1919), pp. 275-281. The petitioner is not, of course, represented by Daniel Webster, except insofar as his example — his courage in speaking for "The Constitution and the Union" and supporting the Compromise of 1850 (V *Webster's Works*, *supra*, p. 324 *ff.*) — still inspires this Court. See J. F. Kennedy, *Profiles in Courage* (Cardinal ed., 1957), pp. 52-68.

At the end of the story about the devil and Daniel Webster, as he boots the devil back to Hades, Webster calls him a "note-shaver" — a "long-barreled, slab-sided, lantern-jawed, fortune-telling note-shaver!" S. V. Benet, "The Devil and Daniel Webster," in *Thirteen O'Clock - Stories of Several Worlds* (Farrar & Rinehart, 1937), p. 182. The basic constitutional question presented by this petition is whether note-shaving is now acceptable as the constitutional morality of our nation.

The Supreme Court of New Hampshire declined to address this question. But the Yankee legal heritage that began with John Adams' defense of the accused in the Boston Massacre, that produced Webster's Seventh of March Speech and Justice Holmes' great dissents in this Court, belongs not just to New England but to the nation. This petition asks this Court to do what the Supreme Court of New Hampshire would not: to honor, preserve and carry on this heritage; in short, to act greatly in defense of the Constitution and the rule of law. As Webster told the jury in the only murder case that he ever prosecuted (VI *Webster's Works*, *supra*, p. 105):

> There is no evil that we cannot either face or fly from, but the consciousness of duty disregarded. A sense of duty pursues us ever. . . . [O]ur obligations

> . . . are with us in this life, will be with us at its close; and in that scene of inconceivable solemnity, which lies yet further onward, we shall still find ourselves surrounded by the consciousness of duty, to pain us wherever it has been violated, and to console us so far as God may have given us grace to perform it.

For the foregoing reasons, this petition for certiorari should be granted, and the Court should hear and determine the important constitutional monetary issues that it presents.

Respectfully submitted,

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Rule 29 Statement

Pursuant to Rule 29(b) of the Supreme Court Rules, notice is hereby given that 28 U.S.C. § 2403(a) may be applicable, and a copy of this petition is being served on the Solicitor General, Department of Justice, Washington, D. C. 20530.

Pursuant to Rule 29(c) of the Supreme Court Rules, notice is hereby given that 28 U.S.C. § 2403(b) may be applicable, and a copy of this petition is being served on the attorney general of New Hampshire. Notice of this case was previously given to the attorney general of New Hampshire under Rule 31 of the Rules of the New Hampshire Supreme Court, but he did not chose to appear or participate.

Appendix A.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 90-398, Walter W. Fischer v. City of Dover & a. the court upon May 17, 1991 made the following order:

Having considered the briefs and oral arguments, the court believes that a formal opinion is not necessary for the disposition of this matter. The decision below is affirmed.

Distribution:

Strafford County Superior Court
Honorable Robert Dickson
William HM Beckett, Esquire
Scott Woodman, Esquire
Reginald H. Howe, Esquire
James Koromilas, Esquire
Donna R. Craig, Supreme Court
File

Ralph H. Wood,

Clerk

Appendix B.

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Walter W. Fischer

v.

City of Dover, New Hampshire

87-E-021

ORDER

(Supplementing Record)

This case is before the Court on remand solely to address the issue of damages as a result of a breach of contract. Trial on the merits was held on July 31 and August 1, 1990, before a jury.

In 1966, the parties made a contract in connection with a road built by the plaintiff for his subdivision. In exchange for his deeding the road and a strip parcel to the city, the city agreed, in the event adjacent owners (other than owners in the plaintiff's subdivision) later were granted access to the road and utilities, the city would ensure that the owners "reimburse [the plaintiff] for such share of improvements . . . as shall be of benefit to said abutting property in proportion to the *frontage on the Drive* owned by said abutters." In 1987, the defendant granted the intervenor a right-of-way to the drive for a driveway and for utilities without compensating the plaintiff.

The parties variously argue that issues of material fact exist which require the case go to the jury, as follows:

1. the plaintiff thought, at the time he executed the agreement, that the law provided that his future reimbursements would be adjusted at the rate of six percent per year;
2. as a result of inflation, the plaintiff's reimbursement should be increased by an amount reflecting the change in the consumer price index from 1966 to 1987, or by the current replacement cost of the road, or by the change in value of gold since 1966;
3. the city's customary practice in assessing corner lots is to base charges on the sum of the footage of both sides divided by two. Because the right-of-way was given to a corner lot owner, the city will be overcharged if the total frontage is used; and
4. the plaintiff made a substantial profit on the lots he sold. Thus, a jury might find that the plaintiff is entitled to nominal damages of one dollar.

The Court concludes that none of the forgoing arguments raises a material issue of fact for the jury.

The meaning of the agreement is clear. The plaintiff shall be "reimburse[d] . . . in proportion to the frontage . . ." The first three arguments seek to vary the plain meaning of the parties' argeement. The parties could have provided for inflation or adjustment for the charge for corner lots, but they did not, and it is not for the Court to rewrite the agreement. Finally, any evidence as to profits made by the plaintiff on sales of lots in his subdivision is clearly irrelevant in this proceeding.

Subject to the Court's rulings as a matter of law, the parties agree on the original cost of the road, total frontage, and frontage on the corner lot, as well as the calculations which result in a reimbursement of $7758.77 to the plaintiff. Accordingly, since there are no disputes on any facts, the Court directs a verdict for the plaintiff in the amount of $7758.77 plus interest from February 12, 1987, the demand date agreed upon

by the parties. See *Morrill* v. *Tilney*, 128 N.H. 773, 778 (1986).

So Ordered.

August 3, 1990 /s/ Robert B. Dickson, Presiding Justice
Dated

Appendix C.

Strafford
No. 87-476

WALTER W. FISCHER

v.

CITY OF DOVER *& a.*

March 6, 1989

1. Corporations—Dissolution—Rights of Former Shareholders
Assets owned by a corporation pass, upon dissolution, to the former shareholders subject to the payment of corporate debts.

2. Corporations—Dissolution—Rights of Former Shareholders
The corporation continuance statute expands rather than limits the rights and remedies of dissolved corporations, and was not intended to supplant or limit the well established equitable rule that the assets of a dissolved corporation devolve to the former shareholders. RSA 293-A:95.

3. Corporations—Dissolution—Rights of Former Shareholders
Former shareholder of dissolved corporation had standing to bring action against city for its failure to comply with an agreement concerning a strip of land which the corporation conveyed to the city, providing for reimbursement to corporation of the cost of improvements benefiting abutters, because the right to reimbursement under the agreement, as an asset, devolved to the former shareholder, and the corporation continuance statute was therefore inapplicable to bar plaintiff's action. RSA 293-A:95.

4. Contracts—Parties

Under elementary contract principles, agreement could not obligate persons who neither were parties to the agreement nor assented to it.

5. Corporations—Dissolution—Rights of Former Shareholders

Where there was a contractual agreement between a city and a corporation, supported by consideration, that the corporation was to be compensated for its construction of a certain road and utilities, and a necessary implication of the agreement was the obligation of the city to ensure that the corporation was in fact reimbursed, former shareholder of dissolved corporation had an enforceable contract claim against the city arising from its breach of its promise of reimbursement.

6. Equity—Jurisdiction—Remedy at Law

Although courts in New Hampshire have broad discretion in exercising equity jurisdiction, equitable jurisdiction lies only when there is no plain and complete remedy at law.

Holland, Donovan, Beckett, Welch & Hermans P.A., of Exeter (*William H. M. Beckett* on the brief and orally), for the plaintiff.

Scott E. Woodman, city attorney, by brief and orally, for the defendant.

James Koromilas, of Dover, by brief and orally, for the intervenors, the heirs of Simon Janetos and Edward and Ahn Murphy.

BROCK, C.J. The issues raised by this appeal are (1) whether the plaintiff, Walter W. Fischer, the former president and sole stockholder of a dissolved corporation, has standing to bring an action against the defendant, City of Dover (City), for its

failure to comply with an agreement concerning a strip of land which the corporation conveyed to the City; and (2) whether the plaintiff's claims for rescission of the deed or reconveyance of the land, based upon an alleged unconstitutional taking and equitable principles of mistake and illegality, were barred by the 20-year limitation period governing the recovery of real estate. *See* RSA 508:2.

The Superior Court (*Groff*, J.) ruled that the plaintiff had no standing. It also found that although the plaintiff's claims for reconveyance of the land based on both equitable principles and an unconstitutional taking were subject to the 20-year statute of limitations, the constitutional claim was time-barred because that cause of action accrued at the time of the conveyance of the land. The court found, however, that the equitable claims were not barred. For the reasons that follow, we hold that the plaintiff has standing to bring this action. We do not address the issue of whether the plaintiff's constitutional or equitable claims were barred, because we hold that the plaintiff has an adequate remedy at law which he may pursue on remand.

Walter W. Fischer, the plaintiff, was the president and sole shareholder of Fischer Homes, Inc., a New Hampshire corporation. On May 29, 1964, Fischer Homes, Inc. (the corporation) purchased a parcel of land in Dover. Upon acquiring the parcel, the corporation applied for preliminary approval to subdivide the parcel into nineteen lots. The subdivision plan called for construction of a road, "Country Club Estates Drive." Between the proposed road, which ran roughly northeast to southwest, and the neighboring property, to the northwest, was a narrow strip of land of varying width, known as the "reserved strip." This strip was essentially part of the road location. The corporation's plan was to retain ownership of this strip, selling lots south of the proposed road.

On August 31, 1964, and later, on May 2, 1965, after a revision of the subdivision plan, the Dover Planning Board (the board) granted preliminary approval of the plan on the condition that the corporation convey the "reserved strip" to the City. In return, the City agreed that the purchasers of land abutting Country Club Estates Drive to the northwest "shall reimburse Fischer Homes for such share of improvements installed by Fischer Homes as shall be of benefit to said abutting property in proportion to the frontage on the Drive owned by said abutters." As a further condition of approval, the corporation was required to file in the office of the city clerk a "certified copy of all actual construction figures necessary to establish the front footage cost of highway construction to be paid by any abutters under the terms of the Contract between the City of Dover and Fischer Homes concerning the proposed reserve strip." The corporation subsequently conveyed the reserved strip by deed, without reservation, to the City on August 19, 1966. On the same date, the corporation gave a deed to the road which it had constructed to the City. In this deed, the following clause appeared:

> "Reserving, however, to Fischer Homes, Inc., its successors and assigns, the right to reimbursement from the owners, their heirs and assigns, of the land abutting Country Club Estates Drive on the Northwesterly side thereof between Gulf Road and Sligo Road as shown on said plan, for their proportionate share of the cost of utilities and road installation when and if they desire to use said facilities to the improvement of their abutting lands. This reservation does not apply to purchasers of lots in Country Club Estates as indicated in the aforementioned plan."

On August 24, 1966, the Dover City Council accepted the deed conveying the road to the City. Subsequently, the corporation sold all of its subdivided parcels, save one, to a third party. On October 19, 1967, the corporation, acting in compliance with its agreement, filed with the city clerk construction cost figures for the road and utilities, totalling $84,395.

Thereafter, on February 23, 1978, the heirs of Simon Janetos submitted for approval a subdivision plan of their property abutting the reserved strip to the northwest, which created one lot for prospective purchasers Edward and Ahn Murphy, who are intervenors in this action. The application was given final approval, contingent upon "[p]roper compliance with all restrictive covenants as filed in the City Clerk's Office, to the satisfaction of Fischer Homes, Inc., and the City of Dover." A dispute as to the correct reimbursement figure led the City to seek the counsel of the city attorney, who advised the City that it could not condition approval of the subdivision plan upon compliance with the reimbursement agreement. He stated that "impos[ing] a duty upon the city to collect monies that may be owed to Fischer Homes, Inc. . . . is an improper exercise of the statutory authority granted to the City, in that the City is using its powers to effectuate a private concern's collection of its debts." Following this advice, the board, on July 25, 1978, approved the subdivision plan, specifically noting that it had removed the condition of reimbursement.

The corporation then appealed the decision of the board to the superior court. It requested the court to set aside and vacate the subdivision approval, and to enjoin the issuance of building permits and subdivision approvals without the board's first requiring reimbursement to the corporation. On August 25, 1981, the court dismissed the appeal, noting that it expressed no opinion regarding the enforceability of the reserved right to reimbursement. The corporation did not appeal this order. Meanwhile, prior to the dismissal, the corporation was dissolved by the Legislature.

Several years later, in February, 1987, the City granted the Murphys a right-of-way over the reserved strip to the road, which allowed them to obtain a driveway permit and a certificate of occupancy. This easement gave the Murphys access to the road. No provision was made for compensation to the plaintiff.

In response to the granting of the easement, the plaintiff filed a bill in equity against the City, claiming that as the sole stockholder of the dissolved corporation, he was entitled to either reconveyance from the City of the reserved strip or rescission of the deed, or, alternatively, compensation for the allegedly unconstitutional "taking" of the reserved strip by the City. The intervenors, the Murphys and the heirs of Simon Janetos, were allowed to join the action.

After a two-day trial, the superior court, without reaching the merits, dismissed the action. It ruled that: (1) the plaintiff had no standing because the corporation had not brought this action within the three-year period following dissolution as required by the corporation continuance statute, *see* RSA 293-A:95, and the cause of action was not an asset to which the plaintiff could succeed as sole stockholder; (2) the plaintiff's claim for reconveyance of the reserved strip, based on an unconstitutional taking, was barred since the 20-year statute of limitations application to the conveyance of real estate began to run at the time of conveyance; but that (3) the claim for cancellation of the deed or rescission of the contract based on equitable principles was not barred by the limitation period since the cause of action did not arise until the "plaintiff could reasonably have been expected to realize that the City was not going to require the payments as a condition of subdivision approval of the reserved strip to the City."

On appeal, the plaintiff claims error. First, he contends that the agreement with the City that the corporation would be compensated for the construction and improvements to the road

was an asset which passed to him upon the dissolution of the corporation. Thus, he argues, the corporation continuance statute is inapplicable and he has standing to bring this action. We agree.

[1] This court has long subscribed to the equitable rule of law that the assets owned by a corporation prior to its dissolution pass, upon dissolution, to the former shareholders subject to the payment of corporate debts. *Hampton v. Hampton Beach Improvement Co.*, 107 N.H. 89, 94, 218 A.2d 442, 446 (1966); *Jenot v. White Mt. Acceptance Corp.*, 124 N.H. 701, 706, 474 A.2d 1382, 1385 (1984). In *Hampton*, this court held that the former stockholders of a dissolved corporation succeeded to a lease which was held by the corporation before its dissolution, and to the rights and liabilities of the corporation in the leasehold estate. *Hampton, supra* at 94, 218 A.2d at 446-47. More recently, in *Jenot*, this court held that the former stockholders of a corporation automatically succeeded, in their individual capacities, to the right to a mortgage and promissory note when the corporation failed to exercise its right to foreclose the mortgage or enforce the note within the three-year windup period. *Jenot, supra* at 707, 474 A.2d at 1386. Although the corporation continuance statute operated to bar the defunct corporation from foreclosing the mortgage or enforcing the promissory note, the statute did not bar the shareholders from suing in their individual capacities. *Jenot, supra* at 707, 474 A.2d at 1385-86.

In the case at bar, the corporation continuance statute in effect at the time of the corporation's dissolution, RSA 294:98, provided the following:

> "[A]ny business corporation dissolved by act of the legislature shall nevertheless continue as a body corporate for the term of 3 years, for the purpose of

> prosecuting and defending suits by or against it and of gradually closing and settling its concerns and distributing its assets, and for no other purpose . . . ."

See present RSA 293-A:95, I(c) and RSA 293-A:106.

[2] As a preliminary matter, we note that "[t]he corporation continuance statute expands rather than limits the rights and remedies of dissolved corporations." *MBC, Inc. v. Engel*, 119 N.H. 8, 11, 397 A.2d 636, 638 (1979). Prior to the enactment of these statutes, the dissolution of a corporation terminated its legal existence in all respects. Under the common law a corporation could no longer sue or be sued, and all pending actions by or against it were abated. *Id.* The statute, which thus served to expand the rights of corporations, was not intended to supplant or limit the well established equitable rule that the assets of a dissolved corporation devolve to the former shareholders. *See Jenot, supra* at 708, 474 A.2d at 1386 (court has not construed corporation continuance statute to supplant equitable rule).

The City and the intervenors rely upon *MBC, Inc.* to support their argument that the corporation continuance statute bars the plaintiff from asserting the rights of the dissolved corporation. In that case, however, the former shareholders sought to recover for tortious injuries sustained by the corporation; they were not seeking to enforce a separate right or asset which had devolved to them as individuals. *MBC, Inc., supra* at 9-10, 397 A.2d at 637; *see Jenot, supra* at 708, 474 A.2d at 1386 (interpreting *MBC, Inc.* as a bar to shareholder derivative actions after expiration of three-year statutory period).

[3] In contrast, the instant case is more closely analogous to *Hampton* and *Jenot*. The corporation's right to reimbursement for the cost of improvements benefiting the abutters was

similar to the promise to pay found in the promissory note in *Jenot*; it was not simply a cause of action which had accrued to the corporation. In fact, the corporation did not have the right to reimbursement until such time as the purchasers of the abutting land "desire[d] to use said facilities [i.e., the road and utilities] to the improvement of their . . . lands." This event did not occur until 1987, when the Murphys requested and were granted an easement in order to gain access to the road. The right to reimbursement did not accrue in 1978, at the time the intervenors gained approval for the subdivision of the abutting land, because at that time they had no access to the road, and, therefore, could not have used the facilities to improve their land. In sum, because the right to reimbursement, as evidenced by the deed, devolved to the plaintiff as former shareholder, he had standing to bring this action.

The plaintiff next argues that the trial court erred in ruling that his claim of an unconstitutional taking was time-barred by the 20-year limitation period governing the conveyance of real estate, which began to run at the time of conveyance. The plaintiff contends that the limitation period did not begin to run until February, 1987, when he had reason to know that he would not be compensated for the land conveyed to the City or, at the earliest in 1978, when the planning board approved the Murphy subdivision plan.

We need not address this issue, however, because we hold that the plaintiff has an enforceable contract claim against the City arising from the breach of its promise of reimbursement. Although the trial court found that "[a] contract between the corporation and the City was apparently never executed," it is evident from the record that there was a contractual agreement between the parties, supported by consideration, that the corporation was to be compensated for its construction of the road and installation of utilities. The deed conveying the road to the City, and the minutes of the May 3, 1965 planning

board meeting, make it clear that the corporation was to be reimbursed in consideration for its conveyances to the City.

The City counters these facts with the argument that the agreement did not obligate it to do anything. Rather, the purchasers of the abutting land, not the City, were to reimburse the corporation. The City further attempts to wash its hands of the agreement by contending that, because it does not have statutory authority to act as a "bill collector," it could not collect money from the abutters on behalf of the plaintiff.

[4,5] In *Laconia Clinic, Inc. v. Cullen*, 119 N.H. 804, 806, 408 A.2d 412, 413, however, this court stated:

> "Terms which are plainly or necessarily implied in the language of a contract are as much a part of it as those which are expressed. If the provisions of the instrument taken together clearly show that the obligation in question . . . is necessary to carry their intention into effect, the law will imply the obligation and enforce it."

See Commercial Union Assurance Co. v. Brown, Co., 120 N.H. 620, 623, 419 A.2d 1111, 1113 (1980). Since the Murphys neither were parties to the agreement nor assented to it, under elementary contract principles, the agreement could not obligate them to reimburse the corporation. 17 Am. Jur. 2d *Contracts* § 18 (1964). It is clear, however, that the intention of the agreement was to provide reimbursement to the corporation for the cost of the road and utilities. The City promised reimbursement to the corporation from "the owners, their heirs and assigns, of the land abutting Country Club Estates Drive." Necessarily implied in this agreement was the obligation of the City to ensure that the corporation was in fact reimbursed, and we hold that it was the City's responsibility to do so. Since

the plaintiff's right to reimbursement accrued in 1987, we note that this cause of action would not be time-barred by the applicable six-year limitation period, *see* RSA 508:4, I.

[6] Finally, we consider the issue of whether the 20-year limitation period governing the recovery of real estate bars the equitable claim for rescission or reconveyance of the reserved strip. Although courts in New Hampshire have "broad discretion in exercising equity jurisdiction (citation omitted), . . . equitable jurisdiction lies only when there is no plain and complete remedy at law." *Thurston Enterprises, Inc. v. Baldi*, 128 N.H. 760, 764, 519 A.2d 297, 300 (1986); *see Sands v. Stevens*, 121 N.H. 1008, 1011, 437 A.2d 297, 299-300 (1981). The plaintiff in this case seeks equitable relief. However, because the plaintiff has a plain and complete remedy at law for the breach of the agreement between the City and the corporation, we need not decide whether the limitation period bars the equitable actions, and we remand this case to the superior court so that the plaintiff may amend his pleadings and litigate the issue of damages. *See Thurston, supra* at 764, 519 A.2d at 300.

Affirmed in part; reversed in part; remanded.

All concurred.

Relevant Provisions of 31 U.S.C. § 5112, as amended:

§ 5112. Denominations, specifications, and design of coins

(a) The Secretary of the Treasury may mint and issue only the following coins:

* * *

(7) A fifty dollar gold coin that is 32.7 millimeters in diameter, weighs 33.931 grams, and contains one troy ounce of fine gold.

(8) A twenty-five dollar gold coin that is 27.0 millimeters in diameter, weighs 16.966 grams, and contains one-half troy ounce of fine gold.

(9) A ten dollar gold coin that is 22.0 millimeters in diameter, weights 8.483 grams, and contains one-fourth troy ounce of fine gold.

(10) A five dollar gold coin that is 16.5 millimeters in diameter, weighs 3.393 grams, and contains one-tenth troy ounce of fine gold.

(b) . . . In minting gold coins, the Secretary shall use alloys that vary not more than 0.1 percent from the percent of gold required. The specifications for alloys are by weight.

* * *

(e) Notwithstanding any other provision of law, the Secretary shall mint and issue, in quantities sufficient to meet public demand, coins which—

(1) are 40.6 millimeters in diameter and weigh 31.103 grams;

(2) contain .999 fine silver;

(3) have a design—

(A) symbolic of Liberty on the obverse side; and

(B) of an eagle on the reverse side;

(4) have inscriptions of the year of minting or issuance, and the words "Liberty", "In God We Trust", "United States of America", "1 Oz. Fine Silver", "E Pluribus Unum", and "One Dollar"; and

(5) have reeded edges.

(f) Silver coins.—

(1) Sale price.—The Secretary shall sell the coins minted under subsection (e) to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses).

(2) Bulk sales.—The Secretary shall make bulk sales of the coins minted under subsection (e) at a reasonable discount.

(3) Numismatic items.—For purposes of section 5132(a)(1) of this title, all coins minted under subsection (e) shall be considered to be numismatic items.

(g) For purposes of section 5132(a)(1) of this title, all coins minted under subsection (e) of this section shall be considered to be numismatic items.

(h) The coins issued under this title shall be legal tender as provided in section 5103 of title 31, United States Code.

(i)(1) Notwithstanding section 5111(a)(1) of this title, the Secretary shall mint and issue the gold coins described in paragraphs (7), (8), (9), and (10) of subsection (a) of this section, in quantities sufficient to meet public demand, and such gold coins shall—

(A) have a design determined by the Secretary, except that the fifty dollar gold coin shall have—

(i) on the obverse side, a design symbolic of Liberty; and

(ii) on the reverse side, a design representing a family of eagles, with the male carrying an olive branch and flying above a nest containing a female eagle and hatchlings;

(B) have inscriptions of the denomination, the weight of the fine gold content, the year of minting or issuance, and the words "Liberty", "In God We Trust", "United States of America", and "E Pluribus Unum"; and

(C) have reeded edges.

(2)(A) The Secretary shall sell the coins minted under this subsection to the public at a price equal to the market value of the bullion at the time of sale, plus the cost of minting, marketing, and distributing such coins (including labor, materials, dies, use of machinery, and promotional and overhead expenses).

(B) The Secretary shall make bulk sales of the coins minted under this subsection at a reasonable discount.

(3) For purposes of section 5132(a)(1) of this title, all coins minted under this subsection shall be considered numismatic items.